85-1426

Supreme Court, U.S.
FILED
FEB 26 1986
JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

No. _____

COAKLEY & WILLIAMS, INC.,

Petitioner

v.

SHATTERPROOF GLASS CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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February 26, 1986

QUESTION PRESENTED

Whether a defense to the applicability of Title 2 (Sales) of the Uniform Commercial Code available to a middleman contractor (based on the contractor's work as an installer providing services) in a suit brought by the ultimate purchaser of the goods is also available to the manufacturer-supplier of those goods to the middleman contractor?

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The Petitioner Coakley & Williams, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 2, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 778 F.2d 196 (4th Cir. 1985), appears in the Appendix hereto, A-1 to A-10. The opinion of the District Court for the District of Maryland is unreported and is contained in the transcript of proceedings of the trial; the portion of the transcript containing the District Court's opinion is reprinted in the Appendix at A-11 to A-33.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 2, 1985 and this petition for certiorari was filed with 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner, Coakley & Williams, Inc. ("Coakley"), acting as the general contractor in the construction of an office building, entered into a contract with Washington Plate Glass Co. ("Washington") under which Washington was to furnish and install a glass curtain wall to be of a uniform gold color.

The contract required Washington to furnish and install vision glass panels, spandrel glass panels, aluminum curtain wall and clips, fasteners and gaskets. The spandrel glass was opaque and not transparent, and covered that portion of the building between the floors. An essential element of the understanding between Coakley and Washington was that the appearance and color of the vision panels and spandrel panels was to be identical when viewed from the exterior of the building.

Washington sent Respondent, Shatterproof, a glass manufacturer, a purchase order for the vision and spandrel panels. This purchase order specified that delivery was to be made to Washington at Coakley's construction site in care of Coakley.

Shatterproof supplied the glass to Washington and installation was made by Washington. The aluminum curtain wall was purchased by Washington from another firm. Shatterproof did not install the glass or furnish any services but only sold the glass to Washington.

Within a few months after installation, the spandrel glass panels (as distinguished from the vision glass) began to become discolored, resulting in a lack of uniformity among the individual spandrel units and with the vision panels.

After protests by Coakley, Washington replaced the spandrel glass panels at no cost to Coakley. Shatterproof supplied the

replacement units at its expense and paid Washington for the labor in re-installation.

However, the replacement product also became discolored. Coakley protested to Washington and to Shatterproof. Despite repeated requests by Coakley, Shatterproof refused to replace the discolored glass.

As a result, Coakley commenced this litigation (Washington in the meantime having gone out of business), claiming breach by Shatterproof of implied warranty under the UCC. Commercial Law Article, Annotated Code of Maryland, Section 2-314 and 2-315. (The requirement of privity had been abolished by Maryland statute).

Shatterproof's defense was that since Coakley purchased not only goods from the wholesaler intermediary, Washington, but also purchased services from Washington (thereby excluding the contract between Washington and Coakley from the UCC),

Shatterproof was relieved of any liability to Coakley under the UCC as a seller of goods.

The District Court granted a directed verdict in favor of the Defendant (A-11) and the Fourth Circuit Court of Appeals affirmed (A-1).

REASONS FOR GRANTING THE WRIT

The question of whether the ultimate purchaser of goods sold by a manufacturer may hold that manufacturer responsible for the implied warranties of merchantability under the Uniform Commercial Code regardless of whether the ultimate purchaser purchases only goods or purchases both goods and services is a question of substantial importance to business and commerce throughout the United States.

The District Court and the Appellate Court held that no consideration should be

given to the nature of the contract between the manufacturer and the wholesaler middleman because those Courts concluded that the U.C.C. was not applicable to the contract between the wholesaler middleman and the ultimate purchaser.

Thus those Courts held that although the manufacturer was clearly only a seller of goods, it could avail itself of any defense the wholesaler middleman might have had because of the wholesaler middleman's role furnishing services.

The parties agree that the contract between the wholesaler middleman and the manufacturer in this case is a contract for the sale of goods governed by Title 2 (Sales) of the Commercial Law Article of the Maryland Annotated Code ("UCC").

Both Petitioner and Respondent agree that the requirement of privity for suits under the UCC was abolished by statute in

Maryland by Chapter 249, Laws of Maryland, 1969.

A manufacturer is and should be subject to the UCC where its contract with the wholesaler is only for the sale of goods and involves no services, regardless of the nature of the contract between the wholesaler and the ultimate purchaser.

The nature of the contract between the manufacturer and the wholesaler should determine the manufacturer's liability under the U.C.C., not the nature of the contract between the wholesaler and the ultimate purchaser.

It makes no sense to permit a manufacturer who sells defective goods and provides no services to claim that the law (the UCC) relating to the sale of goods does not apply to those goods because someone else (a wholesaler middleman) provides services relating to those goods. This is particularly so when the services have

nothing to do with the reason for the defects in the goods sold by the manufacturer.

To hold otherwise is to say that a manufacturer of goods which are defective is liable for implied warranties under the UCC to ultimate purchasers who purchase from an intermediary who furnishes no services in connection with the resale. But, according to that reasoning, the manufacturer is not liable to ultimate purchasers who purchase from intermediaries which furnish services in connection with the resale even though the services have nothing to do with the defect in the goods or the cause of the defect.

The result of the District Court and the Appellate Court's decisions is that although a middleman may sue a manufacturer for implied warranties for defective goods sold by a manufacturer, an ultimate purchaser who also purchases services from

the middleman may not do so even though the same defective goods are involved.

The nature of the contract between the ultimate purchaser and the wholesaler middleman as a contract for the sale of goods and services is totally distinct from the character of the contract between the wholesaler middleman and the manufacturer. The ultimate purchaser should be able to hold the manufacturer for breach of the implied warranties of merchantability and fitness for a particular purpose under the UCC.

The abolition by the Maryland General Assembly of the requirement of privity permits the ultimate consumer in Maryland to sue the original seller of goods. Chapter 249, Laws of Maryland, 1969. Commercial Law Article, Annotated Code of Maryland, Sections 2-314 and 2-318. Firestone Tire and Rubber Company vs. James H. Cannon, 53 Md.App. 106, 452 A.2d 192 (1982). In

Firestone, the Court said that in Maryland the General Assembly eliminated the requirement of privity "by expanding the definition of seller in §2-314(1) and expanding the beneficiaries of implied warranties in §2-318".

Further, the Court in Firestone, said,

> The undeniable objective of the Legislature in the 1969 enactment was to give greater protection to consumers against defective products by expanding the number and types of people who could be liable for the harm done by such products.

To deny the benefits of the UCC to an ultimate purchaser (where the requirement of privity has been abolished) because an intermediary has provided services which have nothing to do with the defect in the goods is to give a "windfall" to the seller who was only a seller of goods and with respect to his immediate purchaser (the intermediary) was subject to the UCC.

The holding of the District Court and the Appellate Court unfairly relieves sellers from responsibility for defects in their products once they enter the stream of commerce if it happens that the products are ultimately sold as part of service contracts.

In Santor v. A&M Karagheusian, 44 N.J. 52, 207 A.2d 305 (1965), the New Jersey Superior Court considered a suit against a manufacturer by a purchaser of installed carpeting and said,

> The manufacturer is the father of the transaction. He makes the article and puts it in the channels of trade for sale to the public. No one questions the justice of a rule which holds him liable for defects arising out of the design or manufacture, or other causes while the product is under his control. After completion the article may pass through a series of hands, such as distributor and wholesaler, before reaching the dealer at the point of ultimate intended sale. The dealer is simply a way station, a conduit on its trip

> from manufacturer to consumer. For these reasons in the recent past the courts of many jurisdictions, in an endeavor to achieve justice for the ultimate consumer, have imposed an implied warranty of reasonable fitness on the person responsible for the existence of the article and the origin of the marketing process.

That decision states clearly the proposition that a manufacturer which puts goods into the stream of commerce should be responsible to the ultimate purchaser; no valid reason can be given why that manufacturer should be excused from his responsibility because one of his distributors performs services for the ultimate purchaser.

The decisions of the District Court and the Appellate Court would produce a bizarre result which is contrary to the basic policy guidelines established by the UCC.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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February 26, 1986

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 85-1053

Coakley and Williams, Inc., a Maryland corporation; Neil T. Coakley; Geraldine L. Coakley; Fred G. Williams; Jean Williams,

Appellants,

versus

Shatterproof Glass Corporation, a Delaware corporation,

Appellee.

and

Washington Plate Glass Co., Inc., a Washington, D.C. corporation,

Third Party Defendant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. John R. Hargrove, District Judge. (C/A HAR-81-334)

Argued: October 8, 1985
Decided: December 2, 1985

Before HALL and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge.

C. Lawrence Wiser (M. Michael Cramer on brief) for Appellants' Gerald I. Katz (Mark J. Stone; Wickwire, Gavin & Gibbs, P.C. on brief) for Appellee.

HALL, Circuit Judge:

Coakley & Williams, Inc. ("Coakley"), a Maryland corporation, appeals from the order of the district court in this diversity action granting judgment on behalf of Shatterproof Glass Corporation ("Shatterproof"). Finding no error, we affirm.

This is the second appeal to this Court in this matter. A full statement of the underlying facts is provided in our earlier opinion, Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456 (4th Cir. 1983). Briefly, the dispute in this case arose from the construction of a building in Lanham, Maryland, in 1977. Coakley, serving as the general contractor, employed by written agreement Washington

Plate Glass ("Washington") "to furnish and install aluminum and glass curtain wall and storefront work" in the building. Washington purchased the glass from Shatterproof. When the glass proved unsatisfactory, Coakley instituted legal action against Shatterproof[1] alleging breach of implied warranties of merchantability and fitness for particular purpose pursuant to the Maryland Uniform Commercial Code ("U.C.C."), Annotated Code of Maryland, § 101 et seq.

Initially, the district court granted Shatterproof's motion for dismissal pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(6). The district court agreed with Shatterproof that the applicability of the U.C.C. turned upon the nature of the contract between Washington and Coakley. Examining that contract, the court concluded that the admittedly hybrid or mixed contract was predominantly one for

service. Finding no material fact in dispute, the court ruled that the U.C.C. was inapplicable and dismissed Coakley's complaint.

On appeal, we remanded this case, holding that the determination of whether a hybrid contract is predominantly for the sale of goods and thus within the U.C.C. presents a factual question generally unsuited to resolution by summary judgment. We further concluded that a substantial factual inquiry into such elements as (1) the language of the contract, (2) the nature of the business of the supplier, and (3) the intrinsic worth of the materials involved normally could not be conducted within the context of a Rule 12(b)(6) motion.

On remand, the district court conducted, as we had directed, a thorough inquiry into the facts surrounding the Washington-Coakley contract. The court also followed

the guidance we offered in our earlier opinion and applied the leading cases on the issue of hybrid contracts under Maryland law[2] to determine whether the "predominant factor" or "thrust" of the contract at issue was toward service or goods. The district court then held that because Coakley was not a buyer of goods within the meaning of the U.C.C., it could not maintain an action for breach of warranties against Shatterproof. The court also concluded that a purchaser of services could not rely upon the abolition of buyer-seller privity contained in the amended Maryland U.C.C.[3] This appeal followed.

In the present appeal, Coakley contends that the district court erred in finding that the contract between Coakley and Washington was primarily for service and thus not governed by the U.C.C. Coakley also asserts that the district

court erred in concluding that Shatterproof was not liable under the U.C.C. as a seller of goods regardless of any contractual relationship between Washington and Coakley.[4] We disagree.

The district court's determination that the contract between Washington and Coakley was primarily for service is a factual one subject to review only under a clearly erroneous standard. Based upon our consideration of the briefs, the record, and oral argument, we find nothing erroneous in the district court's factual conclusion. Nor do we perceive any error in the court's application of the facts to the law.

We also see no merit in Coakley's contention that the district court erred in finding that the applicability of the U.C.C. turned solely on the Washington-Coakley contract. For this argument Coakley relies upon the abolition of

privity in Maryland's U.C.C. § 2-314 and the statement in our earlier opinion that "nothing should prevent Coakley from arguing that Shatterproof, clearly having supplied goods, remains subject to the U.C.C." 706 F.2d at 458 n.8. We believe that Coakley's reliance is misplaced in both instances.

Maryland's amended section 2-314 expanded the definition of "seller" but made no express change in the definition of buyer which remains defined in U.C.C. § 2-103(1)(a) as "a person who buys or contracts to buy goods." The district court had already concluded that Coakley had purchased service, not goods. Coakley offered no controlling authority below to support its contention that the U.C.C.'s clear definition of buyer had been altered. We can, therefore, see no error in the court's conclusion that the expansion of privity in section 2-314 extended no

additional rights to a purchaser of services.

Moreover, our prior statement was not a ruling on the merits of Coakley's claim. Indeed, we expressly stated that it had not figured in the disposition of the case. Id. Our previous action reinstated the controversy with all claims intact. It permitted Coakley on remand to make its argument on the effect of the abolition of privity. It did not guarantee success.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

Footnotes

[1]Washington Plate Glass had become involved in an involuntary bankruptcy proceeding. Efforts by Shatterproof to join it as a third party defendant were unavailing.

[2]The district court's bench opinion noted the applicability of Bonebrake v.

Cox, 499 F.2d 951 (8th Cir. 1974), which was expressly adopted in Maryland in Burton v. Artery, Inc., 279 Md. 94, 367 A.2d 935 (1977). The court in Bonebrake had articulated the "predominant purpose" test that we advocated in our previous opinion.

The district court also properly distinguished the only exception to the predominant purpose test in Maryland, which was stated in Anthony Pools, A Division of Anthony Industries v. Sheehan, 295 Md. 285, 455 A.2d 434 (1983). The court therein had applied U.C.C. warranties to a contract predominantly for service when the defective element (a diving board) retained its identity as consumer goods. The court in the instant case found that the glass did not retain its separate identity, a factual conclusion that we do not find erroneous.

[3]Maryland's U.C.C. § 2-314 as amended addresses the applicability of implied warranties and contains the following language:

> (a) In §§ 2-314 through 2-318 of this title, "seller" includes the manufacturer, distributor, dealer, wholesaler or other middleman or the retailer; and
>
> (b) Any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer.

[4]Shatterproof, in response to Coakley's contention, argues that the district court properly found the U.C.C. inapplicable but that in any instance the statute of limitations had run on any claims Coakley might have. Because we

reject both of Coakley's contentions, we find it unnecessary to address the limitations issue.

OPINION OF THE DISTRICT COURT

THE COURT: Well, I think the first question you will have to deal with which certainly we have to deal, as I said, I would reserve it, but I would deal with it as soon as I reviewed my notes and also looked at the cases, the Maryland cases, and also any 4th Circuit cases or federal cases that go along with it. It is on the question of whether or not this is a contract for services.

Now, of course, the history of this case is one in which this question was dealt with, not only by another Judge of this court, but by the 4th Circuit as well. So we do have a lot of history, and although not factual history we have at least a legal history attached to this case. Now I think I have to make some findings of fact. I certainly must do that on the

question of whether or not this was a contract or service and so forth.

I have reviewed the contract and I will talk about that in a few minutes, but in determining, of course, the Court has dealt with it, the 4th Circuit has dealt with it, and everyone else has dealt with it when you are dealing with a contract for services. Now in the reversing of Judge Ramsey, Judge Ramsey's Order dismissing this case, the Court, that is Judge Murnaghan, stated very clearly that the Plaintiff should have the opportunity to offer evidence in support of their argument that this was a contract for the purchase of goods, which under those circumstances keep them within the purviews of the Uniform Commercial Code. Otherwise, certainly, by way of limitations and every other way could not be in court.

Now also that Court held, and I have to follow the mandates of that Court to

some extent, that the first thing this Court must determine is whether the contract with the Washington Plate Glass was one for sale of goods, and if so, it would therefore be governed by the Uniform Commercial Code. I don't think there is any question that that's what I have to do first and that was a part of that case.

Now the initial determination which has to be made before, I think, the question is what evidence did we have, and, I have to deal with that as I talk about the law because I think you can't separate them. Of course, you have to determine this issue before you can even get involved with the issue of merchantability and also the implied warranty of fitness and the other issue, of course, is the issue of damage.

Now I have made some notes but with the pressing of time they are not as fresh as perhaps they should be. So I am going

to have to review them as I go along so I cover everything. Now there is a dispute, and looking at the evidence, the evidence, as I view the evidence in this case, the evidence was one of Mr. Coakley from Coakley & Williams, his testimony primarily was that he was the general contractor, that although he and his wife and another gentlemen's wife owns the building, that they were a general contractor. I certainly have to find that from his testimony that they were contractors interested in having four walls put up on the building that had certainly been put up and that was the primary interest of his company as a contractor.

Now the ultimate question, though, is did he buy four walls to be put up by a glass contractor or did he buy goods to be put up by someone else, and, I think that is the issue in this case, and, I think that is whether or not this was a mixed

contract for the sale of goods and services or whether or not this was a contract exclusively for service. The appropriate test for this under Article II of the Uniform Commercial Code was articulated by the Maryland Court of Appeals in Burton vs. Artery Company, and the Court adopted the test fashioned by the 8th Circuit, that is, in Brubacker vs. Cox, in 499 F2d at 951, at page 962. That was a 1979 case, which stated that the inclusion in a mixed contract under Article II was to be determined according to the predominant factors. The predominant factors is thrust, their purpose is reasonably stated in the rendition of services with goods incidentally involved, that is, if the goods are only incidentally involved then it is a service contract. If the goods are predominant in the contract then you can have a contract for the sale of goods.

The Court of Appeals of Maryland further refined the test in the Anthony Pool case which I mentioned earlier, although I wanted to review that case to make sure I had the facts. In that case, which is at 455 Atlantic 2d 434, 295 Maryland 285, which is a 1983 case, and, probably one of the more recent cases other than this 4th Circuit case, where the Court states that:

"Under the predominant purpose test as applied by a majority of the courts, a hybrid transaction must first be classified as a sale of goods in order for the Uniform Commercial Code to apply based on implied warranties on the goods included in the transaction."

The threshold question in the Anthony Pool case was whether the contract pertaining to the construction of a swimming pool and for the sale of related equipment, I think in that case was a diving board, fell

within the scope of the Uniform Commercial Code as a contract primarily for the sale of goods. And the Court in that case, that's a Maryland Court of Appeals, in that case, and is a relatively recent case and using the predominant purpose test stated:

"Anthony undertook the construction of an inground steel reenforced gunite swimming pool with hand finished plastic surfacing, tile trim and coping and the Sheehans -- "who were the purchasers" -- were not buying steel rods or gunite or plastic or steel. The predominant factor, that is, the thrust, the purpose of the contract was the furnishing of the labor and servicing by the Anthony Pool while the sale of the diving board was incidental to the construction of the pool itself." Of course, that is what the Maryland Courts had to say about this type of a situation.

Now applying that standard to the case at hand, I think from the testimony of all

the parties, Mr. Coakley, I think Mr. Ruben, Mr. King and in considering their testimony as a whole, and, I think they were contracting for the construction of a wall for a building. I saw nothing in the contract, I saw nothing in their testimony, and I heard nothing in their testimony or in the contract that I see anything where anyone was contracting to buy glass, just a sheer glass window. I saw nothing. I think the testimony was not only clear but it was unequivocally clear by Mr. Ruben when he said that they were contracting to put up a glass wall. I think even more so when you look at his testimony as to the contract and as to the manner in which he acquired the materials and he arrived at the contract price.

Now I do not think in this case and I did not see any evidence where the Coakley & Williams Company was involved in the contract predominantly to buy glass, but,

as I said earlier, it was for the construction of glass walls. They left everything up to the Washington Plate Company. They got involved in nothing other than to make the contract where they submitted a proposal. They accepted it. They did not get involved other than to apply to, I suppose you almost cannot do it, I guess, almost by reasonable inference to have an architectural drawing which set up a building to have a frame to be covered with glass and that the glass walls were clearly a part of it.

The fact that in this case the glass had to be manufactured for the building, it was manufactured, there was no question about that, it had to be fastened to the building and it had to be sealed to the building, and all of this was testified to and is clearly in evidence in this case, all of which required substantial amounts of labor, and that was a part of the

contract. Therefore, if you use the Anthony Pool test, the Coakley-Washington Plate Glass contract was really one purely and simply for the rendition of services. I don't think you could read that contract in any way, fashion, or form, but that it was a contracting company selling its services to construct a glass wall and, incidentally, you have to use glass in a glass wall the same as you have to use bricks in the brick wall, and I don't think the brick company would have been in the same position as Shatterproof Glass if you contracted for brick or if you had aluminum walls and you had the same situation. The substantial part of this contract was a construction contract for the performance of services, that is, the services of constructing four walls on the building. Without the walls this would not have a building. There is no question about that. So without the glass certainly you probably

couldn't have had a building, but it had to be put up and made into a wall. The testimony is abundantly clear by amost all the witnesses that something more than just making the glass had to be done.

Now in the 4th Circuit's Opinion in the instant case, the Court recognized these factors, that is, Judge Murnaghan recognized these factors and he determined, and as I think we discussed earlier, which must be weighed to determine the nature of the contract. I will say first in using the 4th Circuit and I am doing this simply because this is the case we are talking about, the same case, he said the language of the contract, in nature of the business of the supplier, and the intrinsic work of the materials involved. And that is clearly the test that I am using in this test.

Now according to this standard, and the standards set out by the 4th Circuit in

this case, what I said before just tells you what Maryland is doing and what the Uniform Commercial Code has done, but using Judge Murnaghan's test, and he said you use this test but go back and produce the evidence that would make this a sale of goods and that's what he told, I think the Plaintiff. In applying and in looking at the evidence presented by the Plaintiff, the April 6th, 1973 letter contract, articulates itself as one for the furnishing and installing of aluminum and glass curtain walls and store front work on the Lanham office building and that is what that contract was for. Although the initial spandrel glass was not involved, that was the original contract and that was the intent of the parties, and that's what it was intended to be. Washington Plate Glass in 1977 was merely replacing glass as a part of the '73 contract for the defective glass. In that case I think the

evidence shows that it was a failure of the seal. So they were merely replacing the glass. That might have some bearing on the limitation question as to when the limitations began to run, but it does not have any bearing on the nature, the effect, and the understanding of the contract. It was clearly a contract to install four walls on the building and to install it in the most workmanlike manner in which a company could do it. If that were not the intent of the case then I believe in 1977 there might not have been any reason for Washington Plate Glass to even do the work over again at no cost to the company. Those are significant factors because they did it over again, and, therefore, they went to perform a service as opposed to plate glass. I think no one has mentioned it, but that is a very interesting thing that happened. They performed, they remedied a situation which they felt responsible for because their

service was not, remember, it wasn't so much the glass as it was the service, that is, the sealing of the glass, which caused certain discolorations. That goes clearly to what the intent of the parties had in that, and it was clearly intended that a service was to be performed.

Of course, when you look at this contract on a whole, there is no question that the wordings, not only sound, but they read more service than they do of the purchase of goods. Purchase of goods you get a bill of sale as a rule, not always, but you get a bill of sale. Here they have a purchase under, I think, if you look at the contract, it was clearly a contract, Washington Plate Glass Company was submitted a contract as a contractor to perform a job, perform a job.

Now I think there is other significant factors which maybe I should put on the record. Again, in this contract there was

no itemization of how much the prices allowable for labor and how much went to materials in the contract. Although the testimony of Mr. Ruben was that the general practice in the trade was 70 percent materials and 30 percent labor, that is not a part of this contract. It is his statement as to what the practice in the area or in the trade is, but it does not alter in any way whatsoever the full intent of this contract by the parties when they set out all of the services to be performed including the furnishing of the glass, the aluminum, and the store front, which is not in this case too much. But that was all a part of the original contract for the company to perform this service to complete this building. I think when you read, when you look at that, and that's the evidence in this case because that is the contract and that is the testimony of Mr. Ruben, and I think Mr. King's testimony sort of

bolstered this, although I said earlier he was going to do the very same thing Washington Plate Glass was going to do, and right behind him he comes up with what amounts to a service contract as opposed to a purchase of glass. If you look at the contract further there was nothing that gives the Coakley-Williams any say in the purchase price of the glass, only what type of glass you might use, and, I think when you look at the testimony in this case it very clearly shows that the Shatterproof glass was not even the initial glass that was to be used but that some other glass was to be used. However, Mr. Ruben says that the reason they couldn't, and he volunteered this on his own, he wanted to give his reason, not because it was inferior or it was a better glass but simply that the other manufacturers could not furnish the glass in sufficient time to complete the contract on time. So you can see that

when you take all of those things into consideration as far as when you are dealing with the factor, that is the first factor, as to whether or not in the language of the contract, when you take the surrounding facts that goes along with this, I think it is pretty clear that the language of this contract was one for the performance of service.

Now, secondly, the nature of the business. I think also when you look at this contract it is obvious on its face that although the Washington Plate Glass and Shatterproof, as a matter of fact, incidentally in their business might sell glass to somebody, but no witness in this case, on the contrary the witnesses all negate the sale of glass, specifically, the sale of glass alone, because I think they all said that if you supplied them with just the glass they would expect a little more and the contract would not have been

paid. I think the evidence is very clear on that. So you look at the nature of the business and the nature of the business of the people involved in this contract was one with a general contractor, and, Washington Plate Glass was a glass contractor. That is just like a general contractor hiring a plumber contractor, an electrical contractor, in this case a glass contractor, or any other kind of specialized contractor, to perform a service. And the usual custom and trade in the business, unless it is specified in the contract, and it must be specified in the contract, is that the subcontractor as a rule furnishes and uses what materials, brand name, trade name, or whatever materials, as long as it is fit for the job. In this case there was some evidence perhaps that they were going to use Shatterproof Glass but only a certain type of glass, not necessarily that they were going to use gold reflective

glass, which everyone was going to furnish regardless of whether it was going to be Pittsburgh Plate or whatever company.

Now the third aspect of it is the value of the goods. Again, I think I have mentioned that so I can cover all three of the tests. I don't think the Plaintiff has proved not one, I don't know where the evidence is on the value of the goods in this case other than the fact that 70 percent goes to, I think, Mr. Ruben and I want to quote him correctly. I looked at my notes and it says aluminum and glass 70 percent, labor 30 percent. I quoted. I took his direct statement. There is no evidence who made the aluminum. I don't know if Shatterproof did or did not. Washington Plate Glass could have bought the aluminum from some other company, Keyser or one of them. I have no knowledge of that because there was no evidence. But certainly the evidence clearly indicates

that the cost of goods consisted of aluminum and glass. I don't know what part of the aluminum went to the store front or the other parts of the building which we have not even discussed or even brought out in the evidence, but it is obvious that some part of that cost must have gone to the construction of the store front or it would not have been in the contract. I think that is another item which I think the Plaintiff really failed to establish on his case is the true value of the goods. They have an estimated custom of the trade rule of thumb value, which did not establish by any sufficiently, at least for the Court, any clear value of any goods.

That along with the other reasons would indicate that this would be all the more it would be a service contract because in service contracts generally you do not set out any value of the goods. That is a very important item. In a service contract

you give a total figure for service and goods and services to be supplied. Exactly what we have here. This is a standard service contract in the building trade. This is not a new type of contract. It is not an odd type of contract. It is not a fancy contract. It is a standard, and I think the contract itself if I read it correctly says standard contract. It is a printed form that is pretty much universally used in the building contracting business and it is used as a service contract.

The Court thereby concludes it is very obvious that the Plaintiff has not met the burden that is required or even that it was permitted to do by Judge Murnaghan. It fell far short of meeting the burden of proving that this contract in question was one pertaining to the purchase of goods, and, under those circumstances, I have to, I certainly have to conclude and grant the Motion of the Defendant for directed

verdict because this is not a contractual sale, and, therefore, it does not fall under the, I think the evidence convinces me that this is not a contract for sale.

I might add it was very strong that it was not a contract for the sale of goods, it was for the sale of service, and therefore, I have to grant the Motion because if it is for the service, and if you want to sue them for any other breach of contract type of thing you have to have not only privity, but limitations would have long since run. Therefore, it is unnecessary to decide the other issues in this case because my ruling will take care of the issue of limitations, and the issue of damages, and the issue of implied warranties, because the Code says if you don't meet the UCC then you don't, you must meet that test before you meet the test of implied warranties and under the law I think that is pretty obvious.

So I will direct a verdict in favor of the Defendants in this case.

Supreme Court, U.S.
FILED
MAR 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1426

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

COAKLEY & WILLIAMS, INC.,

Petitioner,

vs.

SHATTERPROOF GLASS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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30 pp

THE QUESTION PRESENTED IS MOOT

The factual predicate for petitioner's question, i.e., that petitioner was the "ultimate purchaser of the goods," does not exist. The District Court found as a fact that petitioner was not a buyer of goods, having contracted primarily for services, not goods. (A-11 to A-33). The Fourth Circuit affirmed. Coakley & Williams, Inc. v. Shatterproof Glass Corp., 778 F.2d 196 (4th Cir. 1985). (A-1 to A-10). Petitioner does not ask for review of this finding. Accordingly, the question presented is moot.

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TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

The respondent, Shatterproof Glass Corporation ("Shatterproof")[1], respectfully requests this Court to deny

[1] In accordance with Rule 28.1, respondent represents that it has no parent companies, subsidiaries or affiliates.

the petition for writ of certiorari seeking review of the Fourth Circuit's opinion in this case.

STATEMENT OF THE CASE

I. MATERIAL FACTS

The facts material to the consideration of the question presented are limited to the following. Petitioner, Coakley & Williams, Inc. ("Coakley"), acting as the general contractor in the construction of an office building in Maryland, entered into a contract with a glazing subcontractor, Washington Plate Glass Co. ("Washington"), under which Washington was to furnish and install aluminum and glass curtain wall and storefront work.

The District Court found as a fact that Coakley, under its contract with Washington, had contracted primarily for the provision of services, not for the

sale of goods and thus was not a buyer of goods (A-11 to A-33). The Fourth Circuit affirmed. Coakley & Williams, Inc. v. Shatterproof Glass Corporation, 778 F.2d 196 (4th Cir. 1985) (A-1 to A-10). Coakley does not seek review by the Court of this finding of fact.

II. CONTROLLING STATUTES

Suit was brought by Coakley against Shatterproof, as the manufacturer of the glass materials used by Washington in the performance of its subcontract with Coakley, on the theory of breach of the implied warranties of merchantability and fitness for particular purpose under Maryland U.C.C. §§2-314 and 2-315, respectively. Thus, the controlling law is the Maryland version of the Uniform Commercial Code, contained in Title 2, Commercial Law Article, Annotated Code of Maryland ("Maryland U.C.C.").

The specific Maryland statutory provisions material to the question

presented are Maryland U.C.C. §§2-103(1)(a), 2-314(1) and 2-315. These statutes provide, in relevant part:

> §2-103. Definitions and index of definitions.
>
> (1)(a) "Buyer" means a person who buys or contracts to buy goods.
>
> * * *
>
> §2-314. Implied warranty; merchantability; usage of trade.
>
> (1) Unless excluded or modified (§2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . . . Notwithstanding any other provisions of this title
>
> (a) In §§2-314 through 2-318 of this title, "seller" includes the manufacturer, distributor, dealer, wholesaler or other middleman or retailer; and
>
> (b) Any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer.

* * *

§2-315. Implied warranty; fitness for particular use; applicability to lease and bailment of goods.

(1) Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Sections 2-314(1)(a) and (b) are Maryland amendments to the standard version of the U.C.C.

III. PROCEEDINGS BELOW

The case was initially dismissed by the Maryland District Court pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a cause of action upon which relief can be granted. The ground for dismissal was that the predominant purpose of the Coakley-Washington

contract was the provision of services, not the sale of goods, thus rendering the Maryland U.C.C. inapplicable to Coakley.

On appeal, the Fourth Circuit in Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456 (4th Cir. 1983), held that both the applicability of the Maryland U.C.C. warranties, and the amenability of a non-privity defendant to suit under the Maryland U.C.C., are dependent upon the plaintiff being a "buyer of goods." The Fourth Circuit, based on the Maryland U.C.C. provisions, reasoned as follows:

> Whether the U.C.C. applies turns on a question as to whether the contract between Washington and Coakley involved principally a sale of goods, on the one hand, or a provision of services, on the other. U.C.C. Section 2-314 creates an implied warranty "that the goods shall be merchantable" to be "implied in a contract for their sale." Section 2-315 establishes an implied warranty "that the goods shall be fit" for a particular purpose, "[w]here the seller at the time of contracting has reason to

know [the] particular purpose." (Emphasis added).

Consequently, unless there has been a buyer of goods, the U.C.C. warranties of merchantability and of fitness for a particular use do not apply. Furthermore, unless there has been a buyer of goods, [9] the elimination of a requirement of privity would not have been achieved. [10] Accordingly, both questions (1) as to the availability of the warranties and (2) as to the amenability of Shatterproof, who was not in privity with Coakley, to suit by Coakley, come down to whether the transactions between Washington and Coakley was a sale of goods or the provisions of services.

---

9. Under U.C.C. Section 2-103(1)(a), the term "buyer" is defined, in unexceptional terms, as a "person who buys or contracts to buy goods."

10. See U.C.C. Section 2-314(1)(b): "Any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer." (Emphasis added.) Absent compliance with Section 2-314(1)(b), the lack of privity would have been fatal to Coakley's maintenance of the cause of action. E.g., Vaccarino v. Cozzubo, 181 Md. 614, 31 A.2d 316 (1943).

If the transaction was one for goods, Coakley was self-evidently

> the buyer. Shatterproof was the seller of goods in a transaction in which the intermediary, Washington, not Coakley, was the buyer. However, Washington's purpose in buying was to apply the items purchased to uses benefitting Coakley. (Id. at 458-59).

Finding further that the determination as to whether Coakley was a buyer of goods was prematurely resolved on a 12(b)(6) motion to dismiss, the Fourth Circuit remanded the case for findings of fact on the ultimate factual issue as to the predominant purpose of the Coakley-Washington contract, i.e., whether Coakley was a buyer of goods. Specifically, the Fourth Circuit held that:

> . . . it becomes a question of unresolved fact whether Coakley for the purposes of the single relationship to which we are restricted, was a buyer of goods (Id. at 461),

and ordered that on remand:

> Coakley should, therefore, be permitted to show, unless the statute of limitations bars

> recovery, that it was a buyer of goods and, therefore, entitled to proceed under the U.C.C. provisions. (Id. at 462; footnote omitted).

On remand, the District Court conducted a thorough factual inquiry into the threshold question of whether Coakley's contract with Washington to furnish and install an aluminum and glass curtain wall for a building was predominantly a sale of goods, or one for the provision of services. The District Court applied the test for ascertaining the predominant purpose of mixed goods and services contracts adopted by the Maryland Court of Appeals in Burton v. Artery, Inc., 279 Md. 94, 367 A.2d 935 (1977), and in Anthony Pools, A Division of Anthony Industries, Inc. v. Sheehan, 295 Md. 285, 455 A.2d 434 (1983).

After a three-day trial, the District Court found that the predominant purpose of Coakley's

contract with Washington was for the rendition of services, not for the sale of goods. Hence, the District Court concluded that Coakley was not a buyer of goods within the meaning of the Maryland U.C.C., and thus had no right of action for breach of the U.C.C. implied warranties. The District Court further concluded that as one who contracted for services, Coakley could not rely upon the abolition of buyer-seller privity contained in Maryland U.C.C. §2-314(1)(b). [2]

---

[2]The District Court did not rule on the four additional grounds asserted for dismissing Coakley's action, which included:

(a) Coakley's action was barred by the four-year statute of limitations;
(b) Coakley failed to prove breach of the implied warranty of merchantability;
(c) Coakley failed to prove the existence of any implied warranty of fitness for

(Footnote Continued)

Coakley then appealed for a second time to the Fourth Circuit. The appeal was premised on two grounds. First, Coakley contended that the District Court erred in finding that its contract with Washington was primarily for services, and thus not within the Maryland U.C.C. Second, Coakley asserted that the District Court erred in concluding that Shatterproof was not liable under the Maryland U.C.C. as a seller of goods, regardless of Coakley's own contractual relationship with Washington. For this latter assertion Coakley relied upon Maryland U.C.C. §2-314(1)(b).

(Footnote Continued)
particular purpose, or any breach thereof; and
(d) Coakley failed to prove its damages.

The Fourth Circuit disagreed with Coakley. Coakley & Williams, Inc. v. Shatterproof Glass Corp., 778 F.2d 196 (4th Cir. 1985). (A-1 to A-10). First, the Fourth Circuit found nothing erroneous in the District Court's factual finding, and application of fact to law, that Coakley's contract was primarily for services, thus rendering Coakley a non-buyer of goods. Coakley has not petitioned this Court for review of this finding.

The Fourth Circuit also found no merit in Coakley's second contention. The Fourth Circuit reaffirmed its earlier holding, and that of the District Court, that Maryland U.C.C. §2-314(1)(b) requires a non-privity plaintiff, such as Coakley, to nonetheless be a buyer of goods as defined in §2-103(1)(a), in order to have a right of action under the

Maryland U.C.C. The Fourth Circuit held as follows:

> Maryland's amended section 2-314 expanded the definition of "seller" but made no express change in the definition of buyer which remains defined in U.C.C. Section 2-103(1)(a) as "a person who buys or contracts to buy goods." The district court had already concluded that Coakley purchased services, not goods. Coakley offered no controlling authority below to support its contention that the U.C.C.'s clear definition of buyer had been altered. We can, therefore, see no error in the court's conclusion that the expansion of privity in section 2-314 extended no additional rights to a purchaser of services. 778 F.2d at 198. (A-7,8).

Coakley petitions this Court for review of this second issue.

REASONS FOR DENYING THE WRIT

I. THE MARYLAND STATUTES ARE DISPOSITIVE OF THE QUESTION PRESENTED

A. Maryland U.C.C. §§2-314(1)(b) and 2-103(1)(a) Are Dispositive

Maryland U.C.C. §§2-314(1)(b) and 2-103(1)(a) are dispositive of the

question presented. The Maryland General Assembly's relaxation of the privity requirement coupled with the expanded definition of a seller, but not of a buyer, in §2-314(1)(b), neither broadens the coverage of the U.C.C., nor allows one whose transaction is not a sale of goods to be entitled to sue under the U.C.C. Rather, Maryland U.C.C. §2-314(1)(b) allows one who is in fact a "buyer of goods," and therefore already within the coverage of the U.C.C., to sue a seller of those goods, albeit a seller with whom the buyer is not in privity.

The explicit statutory language of Maryland U.C.C. §2-314(1)(b) abolishes privity only "as between the buyer and the seller in any action brought by the buyer." (Emphasis added). As the Fourth Circuit held, "absent compliance with §2-314(1)(b), the lack of privity is fatal to a non-privity plaintiff's

maintenance of [a] cause of action" under the Maryland U.C.C. 706 F.2d at 459. To comply with §2-314(1)(b), and hence to have a right of action under the Maryland U.C.C. against a non-privity seller, the plaintiff must be a "buyer". A "buyer" under the Maryland U.C.C. is defined in §2-103(1)(a) in unexceptional terms as "a person who buys or contracts to buy goods."

The Fourth Circuit's application of the express statutory definition of the term "buyer" as used in the Maryland U.C.C., and in particular as used in §2-314(1)(b), is consistent with the Maryland courts' repeated application of a rule of strict statutory construction of the Maryland U.C.C. provisions. The Maryland Court of Appeals, the highest court in Maryland, has consistently held that Maryland U.C.C. §2-103(1)(a) clearly limits a "buyer" to one who

actually buys or contracts to buy goods, and excludes third-party beneficiaries of the actual buyer. Mattos, Inc. v. Hash, 279 Md. 371, 368 A.2d 993, 995-97 (1977); Frericks v. General Motors Corp., 278 Md. 304, 363 A.2d 460, 463-66 (1976); Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955, 962 (1976).

At issue in Frericks was whether a non-buyer user of goods, entitled to sue a seller under §2-318 for breach of implied warranty, was required to give notice of the breach pursuant to §2-607. This section provided that "The buyer must within a reasonable time . . . notify the seller of breach . . . ." (§2-607(3)(a); emphasis added). The Frericks court held:

> We are not free, in view of the unambiguous language of §2-607 requiring only the buyer to notify the seller of breach, and the definition of buyer in §2-103, to extend that requirement to encompass the plaintiffs here. As the defendants correctly note, it is a cardinal rule of statutory

> construction that a statute should be construed so as to give effect to the real intent of the Legislature. But in ascertaining that intent, a court must first look to the language of the statute. "If there is no ambiguity or obscurity in the language of a statute, there is usually no need to look elsewhere to ascertain the intent of the legislature." Md.-Nat'l Cap. P. & P. v. Rockville, 272 Md. 550, 555-556, 325 A.2d 748, 752 (1974). Here there is no ambiguity in the language of the statute. Section 2-607 requires only the "buyer" to notify the seller of a breach, and §2-103 clearly defines "buyer" so as to exclude third party beneficiaries. (363 A.2d at 465). (Emphasis added).
>
> * * *
>
> Although the Legislature in the 1969 amendments chose to redefine the word "seller" as used in the warranty provisions to include manufacturers and those in the distributive chain, it did not similarly redefine the word "buyer" to include the expanded class of third party beneficiaries, but instead retained the definition of that term found in §2-103. (363 A.2d at 466). (Emphasis added).

Again, in both Phipps and Mattos, the Maryland Court of Appeals emphasized that use of the term "buyer" meant the "actual buyer". The Court stated:

> In light of the 1969 amendments, the Legislature's retention of the definition of "buyer" as a "person who buys or contracts to buy goods" is no less significant here than it was in Frericks. As we suggested not only in Frericks, but subsequently in Phipps v. General Motors Corp., 278 Md. 337, 349-50, 363 A.2d 955 (1976), it is "an actual buyer" (emphasis added) who is required by §2-607 to give notice. (Mattos, Inc. v. Hash, 368 A.2d at 997).

Hence, the clear and unambiguous statutory language of Maryland U.C.C. §§2-314(1)(b) and 2-103(1)(a) are dispositive of the question presented. A plaintiff such as Coakley, who contracts with an installation contractor for the provision of services, as postulated in the question presented and as found by the courts below, by statutory definition is not a buyer of goods under U.C.C. §2-103(1)(a). Accordingly, a non-buyer plaintiff cannot comply with §2-314(1)(b), and has no right of action under the Maryland U.C.C.

B. Maryland U.C.C. §§2-314(1) and 2-315 Are Dispositive

As the Fourth Circuit further held, "unless there has been a buyer of goods, the U.C.C. warranties of merchantability and fitness for a particular use [in Maryland U.C.C. §2-314 and 2-315, respectively,] do not apply." 706 F.2d at 459. Section 2-314 creates an implied warranty "that the goods shall be merchantable" to be "implied in a contract for their sale." 706 F.2d at 458. Section 2-315 establishes "that the goods shall be fit" for a particular purpose, "(w)here the seller at the time of contracting has reason to know (the) particular purpose." 706 F.2d at 458-59.

Accordingly, the Fourth Circuit correctly held that the question of the availability of the implied U.C.C. warranties, like the question of the amenability of a manufacturer, who is

not in privity with a plaintiff, to suit by the plaintiff, is determined by whether the plaintiff's own transaction was a sale of goods or the provision of services. 706 F.2d at 459.

II. PETITIONER'S POLICY ARGUMENT MUST BE ADDRESSED TO THE MARYLAND GENERAL ASSEMBLY, NOT TO THIS COURT

The Fourth Circuit correctly applied the clear and unambiguous statutory language of the Maryland U.C.C. on both appeals. The question presented is confined to Maryland law as provided in the Maryland version of the U.C.C. The Fourth Circuit's decisions are consistent with both Maryland state and federal case law. No conflict among decisions exist, and Coakley cites to none.

Instead, Coakley argues in essence that as a matter of policy a non-buyer of goods should be able to sue under the implied warranties under the Maryland

U.C.C. Coakley cites no relevant authority in support of its argument.

The Maryland case cited by Coakley, Firestone Tire and Rubber Co. v. Cannon, 53 Md. App. 106, 452 A.2d 192 (1982), is not on point. The Firestone case involved a plaintiff who, unlike Coakley, was a buyer of goods.

Moreover, in Firestone, the Maryland intermediate appellate court applied a rule of strict construction to the definition of the term "seller" for purposes of the notice requirement of Maryland U.C.C. §2-607(3)(a). The Maryland court held that although the Maryland General Assembly amended §2-314 to expand the definition of the term seller to also include remote sellers in the chain of distribution for purposes of warranty actions under §§2-314 through 2-318, the legislature's silence regarding whether this expanded definition also applied to §2-607(3)(a)

meant that it did not apply. The Maryland court held:

> Yet, with presumed (though perhaps not actual) cognizance of the necessary relationship between the warranty sections and the remedy section, [the Maryland General Assembly] declined to extend the definition of "seller" in §2-607(3)(a) which, of course, it easily could have done. (452 A.2d at 198).

Similarly, with presumed cognizance of the relationship between the existing definition of the term "buyer" in §2-103(1)(a), and its use of the term "buyer" in §2-314(1)(b), the General Assebly did not extend the definition of "buyer".

The only other case cited by Coakley, Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965), is a New Jersey case not decided under the Uniform Commercial Code.

Moreover, unlike other states' enactments of the Uniform Commercial Code, Maryland has amended §2-314(1) to

statutorily provide for the relaxation of the privity requirements under statutorily imposed conditions. Accordingly, the decisions of other states are of no import relative to decisions under Maryland U.C.C. §2-314(1). The question presented is confined to Maryland law.

Hence, Coakley offers no relevant authority in support of its argument that as a matter of policy it should have a right of action. The Maryland General Assembly in Maryland U.C.C. §2-314(1)(b) has set forth the circumstances under which the privity requirement is relaxed. Any argument Coakley may have that the privity requirement should be further relaxed in Maryland or that the coverage of the Maryland U.C.C. should be expanded must be addressed to the Maryland General Assembly, not to this Court.

CONCLUSION

Based on the foregoing argument and authorities, the respondent, Shatterproof Glass Corporation, respectfully submits that the petition for a writ of certiorari should be denied as the Maryland statutes are dispositive of the question presented, and no error, conflict or matter of importance is presented for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing BRIEF FOR THE RESPONDENT IN OPPOSITION was mailed, postage prepaid, on the 31 day of March, 1986 to:

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Supreme Court, U.S.
FILED
APR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

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Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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No. 85-1426

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

COAKLEY & WILLIAMS, INC.,

Petitioner

v.

SHATTERPROOF GLASS CORPORATION,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

Shatterproof is subject to the UCC because its contract with Washington was solely for the sale of goods and involved no services. Shatterproof was a supplier of goods only and therefore cannot use the defenses available to a service contract because Shatterproof provided no services.

Shatterproof does not deny in its Brief that it was a supplier of goods only. However, it contends (Respondent's Brief p. 18) that Coakley was not a "buyer" of goods and therefore cannot avail itself of the warranties under the UCC even though Shatterproof was a seller of goods and would otherwise be responsible.

If Shatterproof sold goods, then there was also a "buyer" of goods. The intermediate buyer was Washington and the ultimate buyer was Coakley. Clearly, Washington was a buyer of goods from Shatterproof and would have had the right to sue Shatterproof.

Although Coakley contended in its appeal to the Fourth Circuit that its transaction with Washington was primarily for the sale of goods, that determination is not necessary in order to hold Shatterproof responsible as a seller of goods. To hold that the ultimate purchaser, who has

paid an intermediary purchaser, is not a buyer of goods with respect to the original seller is to defeat the purpose of the abolition of privity enacted by the Maryland General Assembly in 1969.

Whether or not Coakley was a buyer of goods with respect to Washington (because of the services rendered by Washington), Coakley was clearly a buyer of goods with respect to Shatterproof because Shatterproof sold nothing but goods; it provided no services.

The essential elements of a contract for the sale of goods are that there be a seller, a buyer, a price paid and that title to the goods passes. Shatterproof was the seller, Coakley was the ultimate buyer, Coakley paid a price to Washington (which, from those proceeds, paid a price to Shatterproof), and no one questions that title to the goods passed to Coakley.

A seller who sells only goods and pro-

vides no services is responsible for implied warranties under the UCC to ultimate buyers of those goods whether or not those ultimate buyers also purchase services from a middleman. To permit a seller not to be responsible for defective goods sold to a middleman who provides services to the ultimate purchaser gives a windfall to the seller by relieving it of liability for its defective goods purchased by those who buy the goods as part of a transaction involving services while at the same time the seller remains responsible to ultimate purchasers who do not buy any services from the middleman.

As a result of the abolition by the Maryland General Assembly in 1969 (Chapter 249, Laws of Maryland, 1969), a manufacturer who puts goods into the stream of commerce is responsible to the ultimate purchaser; therefore, no valid reason can be given why that manufacturer should be

excused from his responsibility because one of his distributors performs services for the ultimate purchaser.

Upholding Shaffer-Troot's position would produce a disaster result which is contrary to the basic policy underlines established by the UCC, the Maryland General Assembly and the Maryland Court of Appeals.

The Maryland Court of Appeals in Burton v. Atlas, 275 Md. 42, 336 A.2d 252 (Md. 1975), said "The admonition in UCC 1-102(1) is that 'Littles I through 10... shall be liberally construed and applied to promote its underlying purposes and policies.'"

The Maryland General Assembly has reiterated clear its legislative policy of promoting, not narrowing, the rights of purchasers (e.g. its abolition of privity doing terms from any other sales).

The decisions of the Maryland Court of Special Appeals and Maryland Court of Appeals on this subject, Burton, supra, Snyder v. Herbert Greenbaum & Assoc. Inc., 86 Md.App. 144, 585 A.2d 818 (Md. 1991), Anthony Pools v. Sheehan, 295 Md. 285, 455 A.2d 434 (Md. 1983), as well as both of the earlier decisions under the Uniform Sales Act, Way Oil Burner v. Munder, 191 Md. 603, 62 A. 525 (Md. 1948) and Endinegrind & Machine Co. v. Swindell, 181 Md. 572, 31 A. 563 (Md. 1943) have progressed, not re-affirmed, the application of the UCC.

The Burton Court cited with approval Endinegrind & Machine Co. v. Swindell, supra, and found that Court's statement called for literal application of the Uniform Sales Act and stated "that provi-sion is in line with our understanding of the way the UCC is to be applied." Shaffertroot (Respondent's Brief p.

16) cites three Maryland cases for its position that the Maryland Court of Appeals "clearly limits a "pwer" to one who actually pwes or contracts to pwy doog, and excludes third party penetrators of the sexual pwer." But Shaffer has failed to understand the distinction between vertical and horizontal privity. Cokley is not a third party penetrator (horizontal privity) of the sexual pwer, but is the ultimate sexual pwer (vertical privity). The cases that Shaffer cites are all ones involving horizontal privity, with personal injury pd persons other than the ultimate buyer or consumer, e.g. an employee or a passenger of the buyer.

Moreover, all three of those decisions limited the coverage of the UCC so as to permit those plaintiffs to recover; Shaffer's brief is seeking to restrict UCC

coverage so that the plaintiff may not recover. Those cases are Maffos, Inc. v. Hash, 215 Md. 317, 328 A.2d 299 (Md. 1977); Trentacks v. General Motors Corp., 215 Md. 328, 328 A.2d 280 (Md. 1977); and Pippes v. General Motors Corp., 215 Md. 328, 328 A.2d 322 (Md. 1977).

In all of those cases, the Court was restricted the use of the term "buyer" in the UCC to avoid the requirement in the order to give notice of defect to the seller. These were all cases in which the third party penetrations of the buyer had sufficient personal influence: if the satisfactory requirement for them to give notice to the seller applied, they would not have been able to recover. The Maryland Court of Appeals in all three cases took a broad view that the UCC should apply and in order to reach that result, restricted the meaning of the word "buyer" for those types of cases.

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Respectfully submitted,

judgment and opinion of the Fourth Circuit.

Certiorari should issue to review the

stated in the Petition, a writ of

For these reasons, and the reasons

CONCLUSION

Sheffertpoot sold only doogs and provided no services. Cosktey was the ultimate user of those doogs. Martyland has abolished the requirement of privity. The sales of those doogs by Sheffertpoot therefore must be subject to the UCC.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of Petitioner's Reply Memorandum were mailed, postage prepaid, this 5th day of April, 1988, to Gerald I. Katz of Katz, Flinn & Beagan, 8300 Boone Boulevard, Suite 310, Vienna, Virginia 22180, counsel for the Respondent. I further certify that all parties required to be served have been served.